UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN BAKERIES, LLC	
and	
CHERYL MULDREW, an Individual	Case 15-CA-169007
and	
LORRAINE MARKS BRIGGS, an Individual	Case 15-CA-170425
and	
BAKERY, CONFECTIONARY, TOBACCO WORKERS, AND GRAIN MILLERS UNION	Case 15-CA-174022

RESPONDENT SOUTHERN BAKERIES' REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

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Introductory Statement

In its opening brief, Respondent Southern Bakeries, LLC ("SBC") systematically reviewed the ULP findings by the Administrative Law Judge ("ALJ") that were not supported by the evidence, but instead were propped up by the ALJ's choice to ignore probative evidence and to fill in gaps with his own speculation and personal brand of workplace justice. For example, in finding that the decision to discipline Lorraine Marks Briggs ("Briggs") was unlawful, the ALJ inexplicably ignored that her admitted misconduct – grazing on the line and later intimidating a coworker – seriously compromised food and workplace safety and came on the heels of managerial directives against that exact type of misconduct. The ALJ also faulted SBC for crediting Ashley Hawkins ("Hawkins"), the victim of Briggs' intimidation, even though the overwhelming evidence corroborated Hawkins' account. The ALJ's findings in relation to Cheryl Muldrew ("Muldrew") and the Company's workplace rules followed this same pattern, illustrating a results-oriented analysis where evidence corroborating SBC's position was ignored and replaced with unreasonable inferences and conjecture.

The General Counsel's response brief fails to rebut or remedy these shortcomings, and its defense of the ALJ's decision falls far short. The General Counsel does not (and cannot) identify evidence to fill in the evidentiary gaps left by the ALJ. Rather, the General Counsel ignores many of the arguments made by SBC, apparently hoping that by repeating the mantra that the ALJ's decision is supported by "ample evidence," that this Board will simply rubberstamp the decision.

A *de novo* review of the entire record undermines the ALJ's conclusion that SBC engaged in certain unfair labor practices. Accordingly, SBC respectfully renews its request that this Board overrule those findings of the ALJ.

I. Exception 1: The Discipline of Lorraine Marks Briggs for Her Admitted Rule Violations Was Not Unlawful.

SBC has demonstrated that ALJ erred in finding merit to the charges concerning Briggs. (SBC Brief in Support of Exceptions ("SBC Br.") at 15-28.) Other than making conclusory statements about the ALJ's findings, the General Counsel fails to rebut SBC's position in any meaningful way. (General Counsel's Answering Brief ("GC Br.") at 22-23.) Each ULP credited by the ALJ is discussed in turn.

First, the ALJ erred in finding that SBC acted unlawfully in issuing a last chance agreement ("LCA") to Briggs on October 16, 2015. The evidence is uncontroverted that Briggs was caught contaminating product by eating toppings directly off the line. (Tr.149:19-25.) The evidence is also undisputed that her offense was compounded by her decision to ignore a recent mandate from her supervisor, Tony Hagood ("Hagood"), who called a special meeting and drew a "line in the sand" against such misconduct. (Tr.471:10-22.) Put simply, Hagood demanded that employees stop eating on the line or there would be serious consequences, and Briggs ignored him. When confronted by Human Resources Manager Eric McNiel ("McNiel"), Briggs admitted that she regularly ate crumbs off the apple swirl bread. (Tr.422:6-423:16.) She rightly received an LCA. The ALJ's conclusion that she should have received a slap on the wrist – or no discipline at all – reveals that he improperly interposed his own notions of food safety and workplace justice.

In response, the General Counsel contends that Briggs' discipline was motivated by her past union activity, arguing that Briggs received a harsher penalty than others who committed "the same infraction." (GC Br. 22.) Not so. None of the alleged comparators ate product *directly off the line*. (*See* GCXs 10[a-b], [e-f], [i]; 19-22; JX 1 #5; RX 20 at 9-10.)[1] As importantly, unlike Briggs, none of the comparators engaged in their conduct after a *direct mandate* from their supervisor telling them that a line was being drawn in the sand. (*See id.*) *Cf. Canandaigua Plastics*, 285 NLRB 278, 280 (1987) (finding that where employee ignored warning by employer to stop harassing other employees, employer's determination that further action was necessary was not evidence of disparate treatment because of union activity). And the General Counsel provides no logical explanation as to why, if SBC was motivated to discriminate against Briggs, it did not simply terminate her employment rather than giving her another chance. (SBC Br. 18.)

Additionally, the General Counsel has not pointed to any evidence to support the ALJ's supposition that grazing on the line – picking topping directly off of products as they proceed to packaging for customers – is "less likely" to cause product contamination than having a peppermint in one's mouth while one works. (Decision, 3 n.2.) But societal norms and common sense dictates otherwise, as one

[1] The General Counsel ignores that Gloria Lollis and Sandra Phillips – two witnesses called by the Board – affirmed that eating on the line was prohibited and that the rule was a serious one. (Tr.82:6-16, 102:17-19.) Instead, the General Counsel cites Briggs' testimony that she had seen other supervisors eating off the line. (GC Br. 10-11.) Yet, when McNiel asked Briggs to provide specific names of those other persons, she refused. (Tr.335:24-336:16, 120:14-19, 152:5-23.) Thus, the General Counsel's efforts to fault McNiel for not punishing those supervisors rings hollow. Moreover, SBC *did* inquire into Briggs' complaint that Hawkins took a breadstick from the line to eat, as the supervisor, Bob Buckley, asked Hawkins about it and she denied the alleged misconduct. (Tr.263:6-20, 429:24-430:5.)

can easily understand the marked difference between a deli worker who chews gum while he prepares a customer's sandwich versus a worker who steals nibbles from his customer's food. McNiel's logic for imposing the LCA based on Briggs' misconduct aligned with this understanding. (Tr.340:16-341:5.) The General Counsel has not identified any evidence to support the ALJ's supposition to the contrary.

Second, the ALJ erred in finding that SBC violated the law in suspending Briggs on February 8, 2016, during its investigation of the harassment complaint filed against Briggs by Hawkins. The evidence is undisputed that SBC routinely suspended employees while it investigated similar misconduct. (SBC Br. 19-20.) The ALJ failed to explain how suspending Briggs in line with its past practice was in any way discriminatory. General Counsel completely omits any mention of this suspension in response (GC Br. 22-23), signaling that the ALJ's conclusion on this issue utterly lacks any merit.

Third, the ALJ erred in finding that Briggs' discharge on February 19, 2016 violated the law. SBC has detailed the absurdity of the ALJ's decision to fault SBC for crediting the victim's (Hawkins') version of events over Briggs as it pertained to Briggs' intimidating conduct. (SBC Br. 20-24.) The evidence shows that McNiel conducted a comprehensive investigation, interviewing Briggs, Hawkins, Hagood, as well as two other witnesses, Earl Hopson and Sandra Phillips. (*Id.* at 10-12.) The evidence is undisputed that, after undertaking this thorough investigation and weighing the evidence, McNiel honestly believed that Hawkins' account was the

more credible one. This conclusion was reasonable and honestly held – especially considering that large pieces of Hawkins' account were corroborated by disinterested observers. (SBC Br. 21-22.)[2] The ALJ also ignored the context in which Briggs acted – directly after a mandate from McNiel and Hagood reminding against such misconduct and at the height of tensions following Cheryl Muldrew's discharge. (*Id.* at 22.) There was no evidence presented to rebut McNiel's account that Briggs' May 2013 discipline had no impact on his decision, nor was there any evidence that McNiel, the decision maker, had any personal knowledge of or animus against the Union.

The General Counsel fails to rebut any of these deficiencies in the record, instead simply concluding that the ALJ "had an ample evidentiary basis for finding that [SBC's] perfunctory investigation of the February 2016 interaction between Briggs and Ashley Hawkins evidenced its discriminatory motive." (GC Br. 23.) But saying so doesn't make it so. Indeed, there is absolutely no evidence that McNiel's investigation – which included interviewing all the eyewitnesses to the event – was "perfunctory." SBC has identified a number of evidentiary gaps in the ALJ's analysis, and the General Counsel has not (and cannot) fill them.

[2] The General Counsel provides an alternative version of events, which casts Briggs as a victim who sought to pass by Hawkins, when Hawkins "unexpectedly shifted her left shoulder" into Briggs' path and "called out in a loud, rude voice 'excuse you!'" (GC Br. 12-13.) But the evidence is undisputed that in choosing between the she-said, she-said dispute about what happened, McNiel honestly and reasonably credited the account of Hawkins, which was corroborated by other disinterested witnesses. (SBC Br. 20-22.) Like the ALJ, the General Counsel has not identified any evidence to call into question the veracity or reasonableness of McNiel's beliefs, which served as the basis for his termination decision.

The General Counsel seeks to imply that similar incidents of intimidation received disparate treatment. But, as General Counsel admits, "[t]hree other employees were terminated for violating the workplace rules against harassment and/or violence," and others were terminated for leaving their work areas without permission and for insubordination. (GC Br. 20-21.)[3]

A glaring hole in the General Counsel's proof and the ALJ's findings is their supposition that Hagood and McNiel, the decision maker, targeted Briggs because she "was an active and open union supporter" in 2014. (GC Br. 22) The General Counsel contends that SBC was "undeniably aware of these protected activities" and harbored animus against her that motivated her termination. (GC Br. 22.) But there is absolutely no evidence that Hagood and McNiel – both of whom were hired in 2015 – had any knowledge of Briggs' past union activity or that they had any motive to target her on that basis. SBC has pointed out how the ALJ filled this evidentiary gap with his **naked conjecture** that SBC General Manager "[Rickey] Ledbetter played some role in the termination decision and the extent of that role may not be reflected in the record." (SBC Br. 23 (citing Decision, 6).) "[T]he judge's speculation about [McNiel's] knowledge [and Ledbetter's role] does not substitute for the required proof." *Field Family Assocs., LLC*, 348 NLRB 16, 17 (2006). The

[3] The General Counsel seeks to identify instances where similar misconduct did not result in termination. For example, the General Counsel suggests that employee Nadine Pugh "has a history of workplace altercations," but the actual evidence belies that position. While Pugh has had verbal disagreements in the past, there was no finding that her conduct rose to the level of harassment or intimidation. (*See* GX 13-15.) Moreover, that some employees were immediately terminated for misconduct and others were given LCAs does not prove that anti-union animus motivated Briggs' discharge. Rather, "[t]here are simply too many other explanations for [any disparity in rule enforcement] that do not raise concerns under the Act." *New Otani Hotel & Garden*, 325 NLRB 928, 942 (1998).

General Counsel avoids addressing this evidentiary gap in response; and this silence speaks volumes. The ALJ finding on this charge should also be overturned.

Fourth, the ALJ erred in finding that SBC acted unlawfully when Hagood wrote "Do Not Rehire" on Briggs' termination paperwork. Hagood's explanation stands uncontroverted that he did so based on his past practice from his previous employer, and that he believed the physical nature of Briggs' misconduct warranted such an instructive. (Tr.476:19-477:12.) This account was corroborated by McNiel. (Tr.371:24-373:1.) Logically, Hagood cannot have intended to discriminate against Briggs based on her past union affiliation – when he was completely unaware of that past affiliation. General Counsel did not rebut Hagood's testimony in any way at the hearing, nor does it address it in its response brief (other than to point again to an email between counsel in a footnote (GC Br. 19 n.19), an entirely inappropriate tactic (SBC Br. 25-26)). Instead, General Counsel makes the conclusory statement that "the evidence fully supports the Judge's determination that [SBC] discriminated against Briggs by marking her ineligible for rehire." (GC Br. 23.) This is nothing more than an empty assertion. The ALJ erred in finding that Hagood's entry was an ULP, and this finding should not be adopted.

In sum, the ALJ erred by excusing Briggs' misconduct and finding unlawful motive where evidence of such motive was nonexistent. The ALJ's ULP findings relating to Briggs should be overturned.

II. Exceptions 2 and 3: SBC Did Not Unlawfully Mandate That Muldrew Keep Her Discipline Confidential.

Exceptions 2 and 3 by SBC relate to the charges filed by Muldrew. With regard to the second exception, SBC has demonstrated that the ALJ erred in crediting Muldrew's account that McNiel ordered her not to discuss her LCA with anyone. (SBC Br. 28-30.) McNiel explained that he tells employees that human resources will maintain the confidentiality of information shared with them – but he does not mandate against disclosure by the employees themselves. (Tr.329:8-23.) His account was corroborated by at least three disinterested employees called by General Counsel, including Gloria Lollis, Phillips, and even Briggs. (SBC Br. 28-29.) McNiel's account about what he said to Muldrew is the most plausible, as he told her what he told other employees: He would keep what she told him confidential.

Likewise, in Exception 3, the ALJ's decision to believe Muldrew over McNiel cannot withstand scrutiny. The ALJ gave no reason for his decision to ignore the testimony of three other employee witnesses who were called by the General Counsel and who testified that McNiel did not tell them that they were prohibited from discussing their meetings with other employees. The ALJ also glossed over the fact that the General Counsel did not charge SBC with an ULP for terminating Muldrew, which logically implies that the General Counsel found no evidence that her discussion of her discipline influenced her termination.

In its response, the General Counsel fails to respond to any of these points. Instead, like the ALJ, the General Counsel ignores the three employee witnesses who corroborated McNiel's account, contending that "[t]he Judge did not err in crediting Muldrew over McNiel, especially in light of [SBC's] failure to call Capetillo

as a witness who might have corroborated McNiel's testimony." (GC Br. 24.) But it makes no sense to fault the employer for not calling Capetillo to testify, when McNiel's account was already corroborated by three independent witnesses (one of whom was adverse). The General Counsel otherwise asserts that "[t]here is ample record evidence" supporting the ALJ's conclusion. Once again, this sort of conclusory statement is not evidence. The General Counsel simply asks this Court to rubberstamp the ALJ's decision, despite the glaring deficiencies in his analysis.

III. Exception 4: The Audio Recording Rule is Not Unlawful.

As set forth in the opening brief, there is nothing in the rule against audio recordings that restricts an employee's Section 7 rights explicitly or in practice. (SBC Br. 31-33.) In its response, the General Counsel contends that the ALJ correctly found that employees would read the rule to prohibit "mak[ing] recordings in the workplace for employees' mutual aid and protection." (Resp. 26.) But simply requiring the consent of a present or former employee(s) being recorded cannot possibly interfere (or be perceived as interfering) with Section 7 activities. Instead, such a rule gives employees the right to control who records them and should be viewed as respecting, not undermining, employee Section 7 rights. The ALJ determination otherwise should be overruled.

IV. Exception 5: The Rule Against Using Company Time and Resources for Personal Use is Not Unlawful.

Finally, the ALJ erred in finding that the rule prohibiting "[u]sing company time or resources for personal use unrelated to employment with the company without prior authorization." (SBC Br. 34-36.) This rule is strikingly similar to the

workplace rules upheld in *Hitachi Capital America Corp.*, 361 NLRB No. 19 (2014) and *2 Sisters Food Group, Inc.*, 21-CA-38915, et al., 2011 WL 7052272 (NLRB Dec. 29, 2011), each of which included facially neutral prohibitions on leaving company property or one's assigned work area without authorization.

The General Counsel contends that the term "company time" is vague and "fails to distinguish between employee rights during working time and break time." (GC Br. 27.) The General Counsel suggests that the "working time" would be a more appropriate. (*Id.* (citing *Our Way, Inc.*, 268 NLRB 394, 395 (1983).) This splitting of hairs by the ALJ and the General Counsel – where "company time" is an "unwarranted infringement" on Section 7 rights, but "working time" is "presumptively valid," (*see* GC Br. 27), reveals the absurdity of the General Counsel's position. The term "company time" is facially neutral and nothing in that language expressly restricts or interferes with employee rights under Section 7. The strained reading by the General Counsel should be rejected, and the ALJ finding on this issue should be overruled.

Conclusion

Respondent Southern Bakeries, LLC respectfully renews its request that the unfair labor practices found by the ALJ be overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017, a copy of the foregoing "Respondent Southern Bakeries' Reply Brief in Support of its Exceptions to the Administrative Law Judge Decision" was filed electronically with the National Labor Relations Board and has been served upon the following by email:

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